Supreme Court, U.S.
FILED
JUN 10 2002

No. 011815

# In the Supreme Court of the United States

NELLE B. BROWN,
PETITIONER,

*v.*

UNITED STATES OF AMERICA

**On Petition for a Writ of Certiorari To the United States Court of Appeals For the Fourth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Fourth Circuit erred in holding that there was insufficient evidence regarding Petitioner's mental capacity for the purpose of tolling the statute of limitations.

2. Whether the Fourth Circuit correctly held, in conflict with the Second Circuit, that the statute of limitations had run as a matter of law in the case of a "creeping disease" where Petitioner never received a proper diagnosis and the full effects of the complained-of negligence did not materialize until after the running of the statute of limitations.

## PARTIES TO THE PROCEEDINGS

All parties are listed in the caption.

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## PETITION FOR A WRIT OF CERTIORARI

Nelle B. Brown respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals panel (App., *infra*, 1a-5a) is unreported. The opinion of the United States Magistrate Judge (App., *infra*, 6a-11a) to whom the matter was referred, in accordance with 28 U.S.C. § 636(c) and Federal Rule of Civil Procedure 73, is unpublished.

## JURISDICTION

The judgment of the court of appeals was entered on January 9, 2002. App., *infra*, 1a. A timely petition for rehearing was denied on March 12, 2002. App., *infra*, 13a. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent statutes are reproduced in the Appendix. The statute involved is 28 U.S.C. § 2401(b). App., *infra*, 12a There are no constitutional provisions involved.

## STATEMENT

This case involves a question of broad practical importance to the administration of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq*. This case also involves the Fourth Circuit Court of Appeals sanctioning an egregious departure from the accepted and usual course of

judicial proceedings by the lower court, such that this Court should exercise its supervisory power.

Specifically, the Fourth Circuit materially failed to credit evidence in the record which, when taken in a light most favorable to Petitioner, establishes a genuine issue of fact for a trial.

The Fourth Circuit also held that the statute of limitations pursuant to the FTCA had run in November 1953, failing to toll the statute as indicated in *Toal v. United States*, 306 F.Supp 1063, 1065 (D. Conn. 1969), *aff'd*, 438 F.2d 222 (2nd Cir. 1971).

**A. Factual Background**

In 1942, Lieutenant Commander George Brown ("Commander Brown") enlisted in the United States Navy to fight in the Second World War. JA 6[1]. To do so, he left his positions as a math instructor and State Legislator for the State of South Carolina. In 1945, Commander Brown injured his back while on active duty. JA 58. The Navy honorably discharged Commander Brown in 1946. JA 6.

Commander Brown continued to suffer from chronic back pain for a herniated disk, caused by his injury while on active duty. JA 37-38. Commander Brown sought treatment from Veterans' Administration medical facilities in 1950, receiving a myelogram in which an iodized oil, lipiadol, was inserted into his spinal column as a contrast medium. JA 58. The oil was never removed. The government doctors initially assured him that the lipiadol would dissipate within two to

[1] Record citations follow the abbreviations used in the court of appeals for the Joint Appendix (JA).

three years. JA 63. Instead, Commander Brown began to suffer chronic severe headaches. JA 39-40.

Commander Brown's psychological condition worsened as well, as he withdrew into deep depression and acute anxiety, both of which would haunt him for the rest of his life. JA 41 and 59. By the mid-1950s Commander Brown became bedridden, severely handicapped both mentally and physically, and would remain so until his death in 1996. JA 59.

An autopsy performed on Commander Brown in 1996 revealed lipiadol pooling around his brain, and his aforementioned suffering was only then attributed to Chronic Adhesive Arachnoidopathy and the administration of lipiadol in 1950.

**B. Proceedings Below**

Petitioner sued respondent for medical malpractice in Federal District Court for the District of South Carolina. Respondent filed a motion to dismiss, or in the alternative, for summary judgment. The case was referred to a United States Magistrate Judge for all further proceedings and entry of judgment pursuant to 28 U.S.C. § 636(c) and Federal Rule of Civil Procedure 73.

The Magistrate granted summary judgment to respondent, holding that petitioner's claims were time-barred pursuant to 28 U.S.C. § 2401(b).

Petitioner made a timely appeal to the United States Court of Appeals for the Fourth Circuit. A panel of the Court of Appeals affirmed the lower court on January 9, 2002.

Petitioner timely filed a petition for rehearing with the Fourth Circuit Court of Appeals, which was denied on March 12, 2002.

## REASONS FOR GRANTING THE PETITION

### I. THE FOURTH CIRCUIT ERRED IN HOLDING THAT THERE WAS INSUFFICIENT EVIDENCE REGARDING PETITIONER'S MENTAL CAPACITY FOR THE PURPOSE OF TOLLING THE STATUTE OF LIMITATIONS

Petitioner argued to the courts below that the two-year statute of limitations prescribed by 28 U.S.C. § 2401(b) should be tolled due to Commander Brown's mental incapacity.

In response, the Court of Appeals stated:

> We need not decide whether the statute would be tolled under such circumstances, however, because there is a complete lack of evidence showing that Brown was unable to understand his injuries and their cause during the relevant time period. The record demonstrates that Brown had discovered the cause of his injury by November 1951. Moreover, while the records from 1951 show that Brown was anxious and depressed, they also demonstrate that he was able to understand and seek disability benefits for the relationship between the myelogram and his pain. Nelle Brown has failed to offer any evidence of Brown's mental state between November 1951 and

> November 1953, when the statute would have expired.

App., *infra*, 5a.

By so holding, the Court of Appeals failed to even *consider* critical factual evidence in the record, much less hold such evidence to the standard enunciated by this Court. The respondent must have demonstrated the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The facts must be considered in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Petitioner supplied the lower courts with adequate facts which, especially when taken in the light most favorable to Petitioner, establish that there is a genuine issue for trial regarding Commander Brown's mental capacity. As early as 1951 and even continuing after Commander Brown's death in 1996, there is a written record pertaining to Commander Brown's mental health which raises questions about his mental capacity to understand his injuries.

The 1951 medical records relied upon by the Court of Appeals, ostensibly to demonstrate Commander Brown's ability to understand his injuries, actually present a question of material fact for a jury. These records state, "we may be dealing with something more than an anxiety syndrome and that his incessant description of various pain and great detail may represent a hypochondrial reaction which falls into the group of schizophrenias." JA 41.

Commander Brown was hospitalized in 1951 due to severe pain in his head, back and legs. While the doctors diagnosed his condition as meningeal adhesions due to

lipiadol, they did not believe his pain was caused by that condition. J.A. 39-40. Therefore, they referred Commander Brown to a psychiatrist.

The treating psychiatrist noted a drastic change in Commander Brown's physical and mental state, and recorded the following:

> [Commander Brown] came to me after these procedures and I was struck by the marked anxiety which was evident, his history of insomnia, anerexia [sic], weakness and lack of interest. His friend described a marked personality change during the course of his illness from that of a rather out-going person to a withdrawn personality. I feel that we were dealing with a very anxious depressed patient and recommended electric shock... [A]nxiety over the subject mounted to such an extent that it was impossible to continue with therapy... [once hospitalization was attempted, he] became very apprehensive and finally through his intense fear was unable to continue with treatment. [T]his patient should be hospitalized for further observation and treatment.

JA 41.

The treating psychiatrist also indicated that Commander Brown believed the lipiadol was becoming "radioactive" and that it would result in "instantaneous death," and also that the psychiatrist had treated Commander Brown with nine shock therapy sessions over a period of several months. *Id.*

The same psychiatrist noted in 1958 that Commander Brown was "severely handicapped" and appeared very depressed and despondent. JA 45.

The Veterans' Administration awarded Commander Brown 100% disability in 1955 based on catatonic schizophrenia. JA 12. One of Commander Brown's personal physicians wrote a letter in which he noted that the Veterans' Administration themselves had labeled Commander Brown as "schizoid" for almost fifty years. JA 48. The doctor went on to quote the definition of schizoidism as "the state of being split off from one's social and vital environment." *Id.* Another of Commander Brown's physicians wrote a letter describing Brown's progressive decline in mental condition after the aforementioned myelogram. JA 49.

The Court of Appeals, despite having all of the above-referenced facts before them, held that there was a "complete lack of evidence" suggesting mental incapacity between November 1951 and November 1953. App., *infra*, 5a. The Court of Appeals apparently relied solely on a document from the Veterans' Administration Rating Board which stated that Brown was "competent." App., *infra*, 2a. Such reliance is improper, especially when considered in light of the evidence to the contrary, evidence which by law is to be looked at in a light most favorable to Petitioner.

With regard to the tolling issue, the Court of Appeals noted precedent which indicated that tolling may be appropriate when "the incompetence allegedly has been caused by the Government's negligence and limits the plaintiff's ability to understand his injury and its cause." App., *infra*, 5a. The Court of Appeals refrained from ruling on the legal question of tolling because it found as a matter of law that Commander Brown was competent to understand the nature and extent of his injuries.

Such holding is patently against the weight of the evidence presented, and even more inappropriate when such evidence is considered in a light most favorable to Petitioner. The tolling issue should not be ripe for determination until after the fact of Brown's mental condition at the time is properly determined at a trial.

At a minimum, viewing the evidence in a light most favorable to Petitioner, there is a genuine issue of material fact as to his Commander Brown's resulting mental condition and psychological disability, which would have prevented him from understanding the existence and cause of his injury. The extent of Commander Brown's disability should be determined by a jury prior to reaching the legal question of tolling the applicable statute of limitations.

## II. THE FOURTH CIRCUIT INCORRECTLY HELD, IN CONFLICT WITH THE SECOND CIRCUIT, THAT THE STATUTE OF LIMITATIONS HAD RUN AS A MATTER OF LAW IN THE CASE OF A "CREEPING DISEASE"

The Court of Appeals held that Commander Brown had discovered his injury and its cause by November 1951, when he complained of his pain and the suspected cause (the lipiadol introduced during the 1950 myelogram), and when the Veterans' Administration Rating Board attributed chronic meningitis to the retention of lipiadol. Thus, the Court of Appeals held that the FTCA statute of limitations had run by November 1953. App., *infra*, 5a. This holding was in error as discussed *supra*, but also because the Fourth Circuit's application of the "discovery rule" conflicts with the law as interpreted by another Circuit and basic principles of equity and fairness. It is both appropriate and necessary for this

Court to resolve the question of law, especially in the context of "creeping diseases."

The record reveals that Commander Brown could not have known or discovered the true nature and extent of his injuries during his lifetime. The post-mortem examination provided the first and only evidence of the Commander's true condition and its cause. It would have been impossible, by 1953, for Commander Brown to realize the extent of his injuries. He could have proven neither causation nor damages; therefore, the statute of limitations should not have begun to run until the post-mortem examination.

On November 30, 1951, a three-member panel of the Veterans' Administration Rating Board stated:

> The veteran [Commander Brown] was informed that the board was in receipt of the hospital report from Bethesda, Maryland, but was unable to evaluate his condition from this report and that an examination had been set up which is to be conducted by specialists to determine the true nature and extent of his disability.

JA 42.

This report demonstrates that the Board did not credit Commander Brown's complaints about the retained lipiadol, nor did they attribute any of his ailments to the lipiadol. In the same report, the Board notes that Commander Brown believed that residual lipiadol remained in his body from his back surgery and that the lipiadol had scattered throughout his body. *Id.* Rather than illustrate Commander Brown's knowledge of his condition, this report demonstrates that

Commander Brown had no rational concept of the full extent of the cause of his disability.

Lipiadol was introduced into Commander Brown's spinal column during the myelographic studies in 1950, not his back surgery of 1949. JA 18-19. Also, the post-mortem examination revealed that the lipiadol had pooled in Commander Brown's body rather than scattering. *Id.* Further, the report made no mention of any significant ailments that might arise from the lipiadol and instead only referred to meningeal adhesions. JA 40.

The collective opinion of the Veterans' Administration physicians was that the lipiadol was not the cause of Commander Brown's disabilities; rather, Commander Brown's difficulties were labeled as mental and he was referred to seek psychiatric treatment. JA 42.

The "discovery rule" is employed by various states and federal circuits, but there is no standard application of the rule. The FTCA codifies the discovery rule under section 2401(b). 28 U.S.C. § 2401(b). This Court has ruled that the statute of limitations begins to run when a plaintiff knows, or in the exercise of due diligence, should know of both the existence and cause of his injury. *United States v. Kubrick*, 444 U.S. 111, 120 (1979). Petitioner submits that this case is directly analogous to a case in the Second Circuit which reached an opposite conclusion from the Fourth Circuit regarding the discovery rule, and that it is both appropriate and necessary for this Court to resolve the question of law, especially in the context of "creeping diseases."

The Second Circuit affirmed a district court ruling that under the discovery rule, a plaintiff can be held to be injured for purposes of running the statute of limitations only "when the accumulated effects of the deleterious substance manifest

themselves." *Toal v. United States*, 306 F.Supp 1063, 1065 (D. Conn. 1969), *aff'd*, 438 F.2d 222 (2nd Cir. 1971).

The *Toal* case involved a plaintiff who suffered arachnoiditis and subsequent injuries due to pantopaque (an iodized oil) becoming encysted in his skull after the oil was left in his body after a myelogram. The plaintiff had been in a car accident, and the myelogram was part of his treatment program. The government defendant argued that a letter written by the plaintiff in 1962 proved he was aware of his injury and its cause sufficient to begin the statute of limitations. While the plaintiff attributed his pain to the retained pantopaque, the plaintiff did not learn that the pantopaque had attacked and encysted in his brain until March 1964, when a physician made the diagnosis.

In this case, the only evidence of injury related to lipiadol in the record is the 1951 statement of the Rating Board which attributed meningitis to the retention of lipiadol. This same board later changed its opinion and diagnosed Commander Brown with catatonic schizophrenia. The Court of Appeals recognized that the doctors who treated Commander Brown believed his pain was not due to the lipiadol. App., *infra*, 2a. There is no evidence in the record which could have put Commander Brown on notice that the lipiadol was causing his horrific and debilitating injuries for over forty years.

Petitioner respectfully requests that this Court resolve the question of when the statute of limitations begins to run for a plaintiff afflicted with a "creeping disease," the deleterious effects of which may not manifest themselves until years later. This question is one of profound importance to Veterans and other individuals whose only recourse for injuries lies in the FTCA.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 2002

UNITED STATES COURT OF APPEALS,
FOURTH CIRCUIT

Nelle B. Brown,
Plaintiff-Appellant,

V.

United States Of America,
Defendant-Appellee.

No. 99-2400.

Argued Oct. 31, 2000.
Decided Jan. 9, 2002.

Before WIDENER, WILKINS, and LUTTIG, Circuit Judges.

OPINION

PER CURIAM.

Nelle B. Brown (Nelle Brown) appeals a district court order dismissing her medical malpractice claim for injuries suffered by her husband, George Brown (Brown). [FN1] Finding no error, we affirm.

FN1 Nelle Brown filed this action in her individual capacity and in her capacity as personal representative of her husband's estate.

The events giving rise to this suit began in 1945, when Brown injured his back while on active duty in the United States Navy. Brown continued to suffer from a herniated disk after his honorable discharge and underwent a myelogram in 1950 at Lawson Veterans Administration Hospital, in

Chamblee, Georgia. During the procedure, iodized oil (Lipiodol) was used as the contrast medium; the oil was not extracted once the myelogram was complete.

Brown was hospitalized in 1951, complaining of pain in his head, neck, back, and legs, dating from the time of the myelogram. He was diagnosed as having meningeal adhesions due to the iodized oil in his ventricular system. However, because the doctors believed this condition would not cause the pain Brown reported, Brown was advised to seek psychiatric assistance if his symptoms worsened. When Brown did seek such assistance, his treating psychiatrist characterized his complaints as "hypochondriacal." J.A. 41.

In November 1951, Brown appeared before the Veterans Administration ("VA") Rating Board and gave a detailed history of his back pathology. He asserted that the myelogram dye had not been properly removed and had scattered over his body, causing continuous, severe headaches. Also, Brown's treating psychiatrist submitted a letter stating that Brown was anxious, depressed, and perhaps schizophrenic. After reviewing the information before it, the VA Rating Board assigned a combined 90 percent disability rating to Brown for (1) "post-operative ruptured interve[r]tebral disc with chronic sciatic neuritis"; and (2) "meningitis, chronic, due to retained iodized oil in the ventri[c]ular system and anxiety reaction, chronic, severe." Id. at 44. In 1955, the rating board awarded Brown 100 percent disability for catatonic schizophrenia but determined that Brown was still competent.

In 1958, Brown's treating psychiatrist submitted a letter to the VA Regional office noting that in their first meeting Brown attributed his headaches to the earlier myelogram. The letter stated that Brown's prognosis was "very poor," that he was "sever[e]ly handicapped," and that he suffered from "severe hypochondriasis." Id. at 45A. Brown eventually became bedridden and continued to be so until his death in 1996.

Brown's post-mortem examination revealed that he had been suffering from chronic adhesive arachnoidopathy, the manifestations of which include back pain and other sensory disturbances. The examining doctor also noted that Brown's chronic neurologic disturbances were likely caused by arachnoiditis induced by administration of Lipiodol.

In November 1998, Nelle Brown filed an administrative claim with the United States Department of Veteran Affairs for the severe pain she alleged Brown suffered as a result of the administration of the Lipiodol. The claim was denied, and in February 1999 Brown filed the present action in district court. The Government moved for summary judgment, arguing, as is relevant here, that the suit was time-barred because Nelle Brown failed to file an administrative claim within two years of the accrual of her claim. See 28 U.S.C.A. § 2401(b) (West 1994). The district court determined that Brown knew or should have known of the causal connection between his injury and the 1950 myelogram as early as 1951, when Brown informed the rating board that the unremoved Lipiodol was the cause of his symptoms, and no later than 1958, when Brown's psychiatrist submitted the letter recounting Brown's belief that the myelogram was the cause of headaches. On this basis, the district court granted summary judgment for the Government.

Nelle Brown contends that the district court erred in granting summary judgment because there were material issues of fact regarding whether Brown's doctors' determination that Brown was a hypochondriac delayed accrual of his claim and whether Brown's mental condition was sufficiently poor to toll the statute of limitations. We review a grant of summary judgment de novo, viewing the disputed facts in the light most favorable to the nonmovant. See Figgie Int'l, Inc. v. Destileria Serralles, Inc., 190 F.3d 252, 255 (4th Cir.1999). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

Absent waiver, sovereign immunity shields the United States from suit. See FDIC v. Meyer, 510 U.S. 471, 475, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994). The Federal Tort Claims Act (FTCA) provides for a limited waiver of the sovereign immunity of the United States for the torts committed by government employees within the scope of their employment. See id. The FTCA provides that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C.A. § 2401(b). A cause of action for medical malpractice accrues under § 2401(b) when the plaintiff knows or should know of his injury and its cause. See Muth v. United States, 1 F.3d 246, 249 (4th Cir.1993).

Here, Brown was aware in November 1951 that the iodized oil remaining in his body from the myelogram was the cause of his severe headaches. He was informed earlier that year that he suffered from meningeal adhesions caused by the oil improperly left in his system. In addition, he clearly drew the connection between the retained oil and his pain when he applied for VA benefits in November 1951. In fact, the VA Board granted him 90% disability based partly on "meningitis, chronic, due to retained iodized oil in the ventri [c]ular system." J.A. 44. We therefore conclude that Brown was aware of his injury and its cause by November 1951, and his claim against the Government accrued at that time. Consequently, Brown's claim became time-barred in November 1953 unless the statute of limitations was tolled.

Turning to Nelle Brown's tolling argument, we note that the general rule is that mental incapacity does not permit the tolling of the FTCA statute of limitations. See, e.g., Casias v. United States, 532 F.2d 1339, 1342 (10th

Cir.1976). However, at least one court has held that tolling may be appropriate when the incompetence allegedly has been caused by the Government's negligence and limits the plaintiff's ability to understand his injury and its cause. See Oslund v. United States, 701 F.Supp. 710, 712 (D.Minn.1988).

We need not decide whether the statute would be tolled under such circumstances, however, because there is a complete lack of evidence showing that Brown was unable to understand his injuries and their cause during the relevant time period. The record demonstrates that Brown had discovered the cause of his injury by November 1951. Moreover, while the records from 1951 show that Brown was anxious and depressed, they also demonstrate that he was able to understand and seek disability benefits for the relationship between the myelogram and his pain. Nelle Brown has failed to offer any evidence of Brown's mental state between November 1951 and November 1953, when the statute would have expired. Accordingly, Brown's claim became time-barred in November 1953.

In sum, we hold that the district court correctly granted summary judgment in favor of the Government.

AFFIRMED.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

Nelle B. Brown, individually and as personal representative of the estate of George A. Brown, Sr.,

Plaintiff,

VS.

The United States of America,

Defendant.

Civil Action No. 8:99-0500-13AK
ORDER

This matter is before the court on the defendant's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) or, in the alternative, for summary judgment pursuant to Federal Rule of Civil Procedure 56. The action is brought under the Federal Tort Claims Act ("FTCA") and alleges medical malpractice and loss of consortium. In her complaint, the plaintiff alleges that the defendant United States of America was negligent in the treatment and care of her deceased husband's back pain when a myelogram was performed on him at Lawson Veterans Administration Hospital in 1950.

Pursuant to the consent of the parties and order of The Honorable G. Ross Anderson, Jr. on June 1, 1999, the case was referred to this court for all further proceedings and the entry of judgment in accordance with Title 28, United States Code, Section 636(c) and Federal Rule of Civil Procedure 73. For the reasons set forth below, the defendant's motion is granted.

## FACTS PRESENTED

George A. Brown, Sr., ("Brown") served in the United States Navy from August 15, 1942, until October 25, 1946, when he received an honorable discharge. In 1945, Brown injured his back while on military or military-related duty. He was examined and treated in March 1946, and was awarded disability compensation by the Department of Veterans Affairs ("VA") for his back injury in 1947.

In January 1950, Brown was treated at Lawson VA Hospital in Chamblee, Georgia, for a herniated intervertebral disc for which myelographic studies were done. Lipiodol (iodized poppyseed oil) was used as a contrast medium for the myelogram. In August and September 1951, Brown received additional medical attention for his back at the United States Naval Hospital in Bethesda, Maryland. His discharge records, dated September 8, 1951, indicate a diagnosis of "meningeal adhesions due to iodized oil in ventricular system." Def. mem., ex. 2. Thereafter, his mental and physical condition deteriorated. On November 23, 1951, Brown's treating psychiatric physician, Dr. 1. 0. Brownell, wrote a letter to the Chief Medical Officer, VA, Fort Jackson, South Carolina, explaining Brown's medical condition. He noted that Brown "developed severe headaches and was later found to have some lipiodol within the cranial cavity and has been labeled as having arachnoiditis. Id., ex. 3.

On November 30, 1951, Brown personally contacted the VA Rating Board #3 and gave a detailed history of his back pathology from the time of injury. He stated that, subsequent to the 1950 myelogram, dye that was inserted and not removed had scattered over his body, causing continuous severe headaches. Id., ex. 4. The rating board assigned a disability rating to Brown for "meningitis, chronic, due to retained iodized oil in the ventricular system and anxiety reaction, chronic, severe." Id., ex. 5. In 1955, the VA awarded him 100% disability due to catatonic schizophrenia.

On June 19, 1958, Dr. Brownell wrote a letter to Dr. R. S. Matthews, Chief, Mental Hygiene Clinic, VA Regional Office, Columbia, South Carolina, explaining Brown's original office visit "in the early 1950's" for "intense feelings in the top of his head which he attributed to an arachnoiditis, the result of a myelogram some time before." Id., ex. 6. He was essentially confined to his home until his death at age 89.

Brown died at the Augusta Regional Medical Center on November 29, 1996, the cause of which is recorded as "asystole due to shock due to necrosis of the legs due to potassium hydroxide bums." The postmortem examination reports that Brown's chronic neurologic disturbances were likely the result of arachnoiditis induced by intrathecal administration of lipiodol.

On November 13, 1998, Brown's widow, Nelle Baggott Brown, the plaintiff in this action, filed a Standard Form 95 (SF-95), "Claim For Damage, Injury, Or Death," on behalf of her husband, in the amount of $36.5 million. The nature and extent of the injury that forms the basis of the claim is stated as: "The lipiodol which was injected in 1950 to Lt. Commander Brown's head/cranium where it attached to his brain tissue and pooled. This pooling caused severe incurable pain." Id., ex. 7. On December 22, 1998, W. M. Thigpen, Department of Veterans Affairs, Office of Regional Counsel, Atlanta, Georgia, issued a final denial letter of the plaintiffs administrative claim. This action was subsequently filed on February 23, 1999.

## APPLICABLE LAW AND CONCLUSIONS

The defendant has moved to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b), or in the alternative, for summary judgment pursuant to Rule 56. The defendant cites three bases for dismissal: (1) the plaintiffs claims are barred by the two year statute of limitations; (2) the plaintiffs medical malpractice claim should be dismissed

as an expert's affidavit was not filed contemporaneous with the complaint as required under
Georgia law; and (3) the plaintiffs consortium claim is jurisdictionally barred since she did not properly exhaust her administrative remedies.

The FTCA provides for a limited waiver of the sovereign immunity of the United States for the torts of government employees committed within the scope of their employment. Under the FTCA, "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two years after such claim accrues ...." 28 U.S.C. §2401 (b) (1999). The two-year limitations period is jurisdictional and may not be waived. Ahmed v. United States, 30 F.3d 514, 516 (4th Cir. 1994) (citing Henderson v. United States, 785 F.2d 121, 123 (4t" Cir., 1986)). A cause of action accrues under Section 2401 (b) when a plaintiff knows or, in the exercise of due diligence, should know of both the existence and cause of his injury. United States v. Kubrick, 444 U.S. 111, 120 (1979). The test is measured by an objective standard.

The plaintiff argues that the limitations statute started to run on December 3, 1996, when the postmortem examination showed that the neuropathologic diagnosis of chronic adhesive arachnoidopathy was a direct result of arachnoiditis induced by intrathecal administration of lipiodol. According to the plaintiff, the limitations period should be tolled "[s]ince the decedent relied on his treating physician's statement that the lipiodol would cause him no harm, he was not put on notice at time that he had the myelogram that any injury had occurred." Pl. mem. at 6. The plaintiff further contends that since the negligence of the VA physicians in the administration of the lipiodol caused Brown's incapacity and inability to understand that he had been injured, the statute should be tolled for as long as the decedent was incapacitated as a result of the defendant's negligent actions. Id. The plaintiff argues: "The decedent in this case was also

not given any explanation as to why he was suffering from catatonic schizophrenia and it was only after his death and the subsequent autopsy revealed the severe arachnoiditis was the causal connection between the injury and the VA doctor's negligence able to be established." Pl. mem. at 8.

In Kubrick, the Supreme Court noted that Mr. Kubrick, when "armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community." Kubrick, 444 U.S. at 123. The Court reasoned that "[t]o excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require reasonably diligent presentation of tort claims against the Government." Id.

In this case, Brown, as early as September 8,1951, when he was discharged from the U.S. Naval Hospital, had the diagnosis of "meningeal adhesions due to iodized oil in ventricular system." Def. mem., ex. 2. On November 23,1951, Dr. I. 0. Brownell, wrote a letter to the Chief Medical Officer, VA, Fort Jackson, South Carolina, noting that the plaintiff "developed severe headaches and was later found to have some lipiodol within the cranial cavity and has been labeled as having arachnoiditis. Id., ex. 3.

On November 30,1951, Brown personally contacted the VA Rating Board #3 and gave a detailed history of his back pathology from the time of injury. He stated that, subsequent to the 1950 myelogram, dye that was inserted and not removed had scattered over his body, causing continuous severe headaches. Id., ex. 4. On June 19, 1958, Dr. Brownell wrote a letter to Dr. R. S. Matthews explaining Brown's original office visit "in the early 1950's" for "intense feelings in the top of his head which he attributed to an arachnoiditis, the result of a myelogram some time before." Id., ex. 6.

Clearly, as early as 1951 and no later than 1958, Brown and his family knew or should have known of the causal connection between his injury and the lipiodol used in the

myelogram in 1950. As such, the plaintiffs claims are untimely, and summary judgment should be granted. In view of the foregoing, the defendant's alternative grounds for summary judgment will not be analyzed.

Now, therefore, based on the foregoing,

IT IS ORDERED that the Clerk is directed to enter judgment for the defendant in this action.

IT IS SO ORDERED.

/s/ WIlliam M. Catoe
WILLIAM M. CATOE
UNITED STATES MAGISTRATE JUDGE

August 10, 1999
Greenville, South Carolina

Filed August 17, 1999

## 28 U.S.C. § 2401

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.